No. 93-1543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHRISTINE MCKENNON,

Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

I.

THERE IS A CLEAR CONFLICT BETWEEN THE CIRCUITS CONCERNING THE CONSEQUENCES OF AFTER-ACQUIRED EVIDENCE

Respondent argues that there is no conflict between the circuits on the question of the after-acquired evidence doctrine because all of the circuits that have ruled have adopted the doctrine. Respondent misconstrues the different positions of the circuits and, therefore, does not properly analyze whether there is a conflict.

The conflict is not over whether after-acquired evidence that would support the challenged employment

decision if it had been known at the time should or should not be considered by a court deciding an employment discrimination claim. Rather, the dispute is over the effect of the after-acquired evidence on whether or not it bars any relief for a plaintiff who has suffered illegal discrimination. That conflict is real and consequential.

As respondent acknowledges, the Tenth and Sixth Circuits bar *any* remedy.[1] (Brief in Opposition, p. 11.) The Eleventh Circuit, on the other hand, has squarely rejected the Tenth Circuit rule and has held that the effect of after-acquired evidence is only to limit the remedy available, not to defeat liability.[2] (*Id.*) The Seventh Circuit has been equivocal, indicating that at least in some cases all relief will not be barred.[3] (*Id.* at 10-11.)[4]

The conflict is not, as respondent would have it, over "slightly different approaches." (*Id.* at 11.) If the present case had arisen in the Eleventh Circuit, for example, the burden would have been on respondent to prove that it would have discovered petitioner's alleged misconduct even

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[1]*Summers v. State Farm Ins.*, 864 F.2d 700 (10th Cir. 1988); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993).

[2]*Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992).

[3]*Compare Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) *with Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364 (7th Cir. 1993).

[4]The Eighth Circuit has recently decided to follow *Summers* rather than *Wallace*. *Welch v. Liberty Machine Works, Inc.*, ___ F.3d ___ (8th Cir. No. 93-2670, May 6, 1994). However, the Eighth Circuit also imposed a heavy burden on the employer of establishing that the policy that allegedly would have justified the employee's termination pre-dated the challenged personell action, and held that self-serving affidavits by company officials were not sufficient.

in the absence of the litigation (a highly dubious proposition) and when it would have made that discovery. Petitioner would have been entitled to back pay (and, under the Age Discrimination Act, perhaps liquidated damages) up to that point, as well as her attorneys' fees. Under the Sixth and Tenth Circuit rules she was entitled to nothing even though she was (as must be assumed in the posture of the case as it stands now) the victim of age discrimination and even though, in the absence of her justified fear of being illegally fired, she would not have committed the alleged misconduct.

In short, there is as much disarray between the circuits over whether another reason for a challenged employment decision bars a finding of liability or only limits relief as the disarray that led this Court to grant certiorari in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 n.2 (1989). The issue presented here is equally as important as in that case, the conflict is as great, and a grant of certiorari is as necessary and justified.

II.

THE POSITION OF THE UNITED STATES IN *MILLIGAN-JENSEN* IS RELEVANT TO WHETHER CERTIORARI SHOULD BE GRANTED IN THIS CASE.

In its brief, respondent seeks to discount the position taken by the United States in *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 125 L.Ed.2d 686, *cert. dismissed*, 125 L.Ed.2d 773 (1993) by suggesting that that position depended on the Civil Rights Act of 1991 being applicable here. This is not the case, however. The government's argument was that the after-acquired doctrine of the Tenth and Sixth Circuits undermined enforcement of the anti-discrimination laws. In addition, its brief in support of a grant of certiorari in *Milligan-Jensen* pointed out that the

doctrine was inconsistent with this Court's decision in *Price Waterhouse v. Hopkins*, *supra*, which, of course, predated the 1991 Act. (Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae in No. 92-1214, p. 10.) Its reference to the 1991 Act acknowledged that it was not directly applicable, but noted that it was an expression by Congress that discrimination constitutes a violation of the law, and that the existence of an alternative reason for the challenged employment action should not defeat liability under the anti-discrimination statutes. (*Id.* at 12.)

Finally, the now-superseded EEOC Policy Guidance cited by respondent at pages 21-22 of its brief supports petitioner's argument that liability is not barred by after-acquired evidence. In the paragraph quoted by respondent, the EEOC states unequivocally that the plaintiff is entitled to some relief, although the employer may be able to limit that relief. Whether this states the proper rule, and the extent to which full relief should be limited, are precisely the issues presented by this case.[5]

[5]In addition to supporting the grant of certiorari in *Milligan-Jensen*, the EEOC filed an amicus brief and argued in support of petitioner when this case was before the Sixth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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